IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

TUESDAY, THE 11TH SEPTEMBER 2007 / 20TH BHADRA 1929

SA.No. 199 of 1994(F)

A.S..NO.69 OF 1993 OF THE SUBORDINATE JUDGE OF THALASSERY
O.S.NO.259 OF 1988 OF THE MUNSIFF'S COURT, KUTHUPARAMBA.

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PLAINTIFF/RESPONDENT/APPELLANT:

P.K.KARTHIYAYINI,
KAILAS HOUSE,
MANANTHERI AMSOM AND DESOM,
CHITTARIPARAMBU, TELLICHERRY.

BY ADV. SRI.V.SIVASWAMY
SRI V.V. ASOKAN
SRI K.I. MATHANKUTTY MATHER
SRI R. RAJESH

DEFENDANTS:APPELLANTS:RESPONDENTS:

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1. **KARAYI BALAN,**
   RAYAROTH VEETTIL, MANANTHERI,
   CHITTARIPARAMBU, TELLICHERRY.

2. **KARAYI KARUNAN,**
   RAYAROTH VEETTIL, MANANTHERI,
   CHITTARIPARAMBU, TELLICHERRY.

3. **MEETHALA RAYAROTH NARAYANI,**
   RAYAROTH VEETTIL, MANANTHERI,
   CHITTARIPARAMBU, TELLICHERRY.

BY

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 11/09/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

KSS

M.SASIDHARAN NAMBIAR,J.

S.A.NO. 199 OF 1994

Dated 11th September 2007

J U D G M E N T

Plaintiff in O.S.259 of 1988 on the file of Munsiff court, Kuthuparamba is the appellant. Defendants are respondents. Appellant instituted the suit seeking a decree for permanent prohibitory injunction restraining respondents from causing any obstruction to the appellant in maintaining the northern and western mud bunds of plaint schedule property by taking mud from northern and western kila, which are parts of the property of appellant. Case of appellant in the plaint is that he purchased plaint schedule property as per Ext.A1 sale deed dated 25/7/1975 and property of respondents is to the south of the plaint schedule property and after the assignment appellant constructed compound wall of a height of 6 feet to separate plaint schedule property from the property in the possession of Chathukutty and respondents constructed a boundary wall having a

height of 3 feet to separate his property from the property of appellants and a keerikila was also formed to its north which is the southern boundary of the plaint schedule property and to the north and west of plaint schedule property, there is kila and mud wall which form the boundary of plaint schedule property on the north and west and they are to be maintained by taking mud from the kila and respondents have no right to obstruct the same and as they are obstructing they are to be restrained by a permanent prohibitory injunction. Respondents in the written statement contended that northern and western boundary of the plaint schedule property is a road having a width of 8 to 10 feet and appellant is not entitled to obstruct the usage of that road and respondents have a right to use that road and no portion of the property of appellant was utilised for construction of the road and respondents have no objection for appellant maintaining the northern and western bund of his property but he is not entitled to cause any obstruction to right of way.

2. Learned Munsiff on the evidence of Pws.1 and 2, DW1 and Exts.A1, C1 to C6 found that plaint schedule property is as demarcated by the Commissioner in Ext.C6 plan and portion of the property on west and north, which

is part of kila is the property of appellant and appellant is entitled to maintain northern and western bunds by taking mud from the kila. Though respondents contended that there is a road on north and east of plaint schedule property it was held that they did not establish any right of easement by prescription over the road and therefore granted a decree for injunction in favour of appellant. Respondents challenged the decree and judgment before Sub court, Thalassery in A.S.69 of 1993. Learned Sub Judge on appreciation of evidence found that evidence of Pws.1 and 2 establish that property obtained under Ext.A1 is enclosed by a wall on the north and west and the road exists on the north and west of plaint schedule property and that road is being used by respondents and the public and appellant is not entitled to cause any obstruction to that use and appellant has no right of easement to maintain the wall by taking mud from the road and no such right of easement is recognised by law and appellant is not entitled to decree granted by trial court. Appeal was allowed and suit was dismissed. It is challenged in the second appeal.

3. Appeal was admitted formulating the following substantial questions of law.

1) Is not the right claimed by plaintiff to repair the compound wall, a customary easement as contemplated in Section 18 of Easements Act.

2) Was the lower appellate court justified in dismissing that claim on the ground that such a right is unknown to Easements Act.

3) Was the lower appellate court justified in interfering with the judgment of trial court.

4. Arguments of learned counsel appearing for appellant was heard. Though notice was served on respondents, they did not appear.

5. Arguments of learned counsel is that it has been specifically pleaded in the plaint that practice in the locality is to maintain mud wall by taking mud from kila which will be part of the property of the owner left while constructing the mud wall and after first respondent purchased his property which lies to the south of plaint schedule property, he constructed a mud wall after forming a keerikila to its north and to the south of the plaint schedule property and this was not disputed in the written statement. Learned counsel argued that

Section 18 of Indian Easements Act recognises a customary easement right and under Section 7 (b) of Indian Easements Act, right of every owner of immovable property to enjoy without disturbance by another the natural advantages arising from its situation is recognised subject to any law for the time being in force and the right claimed by appellant would come under illustration (e) and therefore the finding of first appellate court is not sustainable.

6. Section 18 of Indian Easements Act provides that easement may be acquired in virtue of a local custom and such easements are called customary easements. That customary easements are to be distinguished from the customary rights referred under Section 2(b). Under sub Section (b) of Section 2, any customary or other right (not being a license) in or over immovable property which the Government, the public or any person may possess irrespective of the property is saved by deeming provision. Section 7 provides that easements are restrictions of one or other of the following rights coming under clause (a) or clause (b). Under clause (b) right of every owner of immovable property, subject to any law for the time being in

force, to enjoy without disturbance by another the natural advantages arising from its situation is recognised. Illustration (e) provides right of every owner of land that such land, in its natural condition, shall have the support naturally rendered by the subjacent and adjacent soil of another person. Question is whether appellant has pleaded a customary easement right as provided under Section 18 and whether appellant has established such a right and if so, whether appellant is entitled to the decree for injunction granted by the trial court and set aside by first appellate court.

7. No customary easement right as such was pleaded in the plaint. What is pleaded in the plaint is only that when mud wall is constructed on the boundary of the plaint schedule property, a portion of the property is left as kila to enable maintenance of the mud wall and the practice is to take mud from that kila and maintain the mud wall. What was contended in the plaint is that due to rain or improper maintenance, there is a possibility of the mud wall falling into the kila and unless mud wall is repaired cattle may enter the property through that portion of the wall or improvements in the property would be destroyed. But no customary easement

right as such was pleaded. Even if it is taken that a customary easement right was pleaded, which is not the case. The case could could only be that portion of the property of the owner will be left, while constructing mud wall to enable the owner to take mud from that portion of the property and repair the mud wall.

8. Question then is whether appellant has any right over the property which lies to north and west of the mud walls. Though it was contended in the plaint that portion of the property being the kila on north and west forms part of the property purchased under Ext.A1 appellant when examined as PW1, admitted that he purchased the property in 1975 and at the time of purchase the mud walls were in existence on the north and west. Description of the boundaries in Ext.A1 shows that northern and western boundaries are Edavazhy. Therefore, what was purchased by the appellant under Ext.A1 is only the property which lies to south and east of the existing mud wall including mud walls and not any portion of land which lies to west or north of the mud walls including the kila. If that be so, even if there is a customary right which according to appellant is a right of easement provided under Section 18 or Section 7(b) of Indian

Easements Act, on the facts and evidence of the case, appellant is not entitled to take mud from the existing road so as to cause obstruction to the road. As rightly found by first appellate court evidence of PW2 itself establish that road has been formed by people of the locality and they have a right to use that road. Therefore appellant is not entitled to cause any obstruction to that road, though appellant is entitled to maintain the mud walls even by taking mud which had fallen on the road from the mud walls. In such circumstances, I find no merit in the appeal. Appeal is dismissed.

M.SASIDHARAN NAMBIAR,
JUDGE.

uj.

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M.SASIDHARAN NAMBIAR,J.

JUDGMENT

S.A.NO.199 OF 1994

11th September 2007

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